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126255
JJ

STATE OF MICHIGAN

IN THE MICHIGAN SUPREME COURT
(ON APPEAL FROM THE MICHIGAN COURT OF APPEALS)

LACY HARTER and MIKE McCLELLAND,
As Co-Personal Representatives of the Estate of
KEGAN McCLELLAND, Deceased and LACY HARTER,
Individually and MIKE McCLELLAND, Individually,

Plaintiffs-Appellees,

vs.

GRAND AERIE FRATERNAL ORDER OF EAGLES,

Defendant-Appellant,

and

HOWELL AERIE #3607 FRATERNAL ORDER
OF EAGLES,

Defendant-Appellee,

and-

MICHIGAN STATE AERIE FRATERNAL ORDER
OF EAGLES, HARRIS SEPTIC CLEANING AND
ALWAYS CLEAN PORTABLE TOILETS, INC.,
DALE HARRIS, Individually, and AMERICAN
CONCRETE PRODUCTS, INC., Individually,

Defendants, Not Participating.

Supreme Court Docket
No:126255

COA Docket No: 244689
L.C. Case No. 00-17892-NO
HON. DANIEL A. BURRESS

COURT OF APPEALS PANEL:
HON. JESSICA COOPER
HON. KAREN FORT HOOD
and
DISSENTING:
HON. PETER D. O'CONNELL

BRIEF IN OPPOSITION TO PLAINTIFFS-APPELLEES' MOTION FOR RECUSAL AND FOR EVIDENTIARY HEARING

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BRIEF IN OPPOSITION TO PLAINTIFF-APPELLEES' MOTION FOR RECUSAL AND FOR EVIDENTIARY HEARING

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STATUTES

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STATEMENT OF QUESTIONS PRESENTED

IS THIS UNTIMELY, REDUNDANT AND STRATEGIC ATTEMPT BY MR. FIEGER TO MANIPULATE THE MICHIGAN APPELLATE SYSTEM BY SHOPPING FOR JUDGES UNDER THE GUISE OF A RECUSAL MOTION A TRANSPARENT GIMMICK TO INFLUENCE THE APPELLATE OUTCOME WHICH, BY DEFINITION, CANNOT BE A DEPRIVATION OF DUE PROCESS?

Plaintiffs-Appellees say "No".

Defendant-Appellant says "Yes".

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COUNTER-STATEMENT OF FACTS

Virtually every "fact" stated by Appellate Counsel for Mr. Fieger in support of this Recusal Motion relates to extraneous references which are completely de hors this record. As such, there is no competent Factual Statement possible to be made or which necessarily requires reply at this time.

However, to the extent that corrective factual matters are necessarily undertaken in reply, these corrective facts appear in the Argument section of the within Brief which now follows.

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ARGUMENT

THIS UNTIMELY, REDUNDANT AND STRATEGIC ATTEMPT BY MR. FIEGER TO MANIPULATE THE MICHIGAN APPELLATE SYSTEM BY SHOPPING FOR JUDGES UNDER THE GUISE OF A RECUSAL MOTION IS A TRANSPARENT GIMMICK TO INFLUENCE THE APPELLATE OUTCOME.

THE SISYPHEAN VERSION OF THE SAME RECUSAL MOTION

Here we go again. In Grievance Administrator and Attorney Grievance Commission v Fieger, Docket No. 114748, __ Mich __; 609 NW2d 184 (2000) a parallel motion argued during one of Mr. Geoffrey Nels Fieger's several challenges to his ethics was filed to disqualify Justices Corrigan, Young and Taylor. The Motion was denied on similar, substantive grounds as to Justices Corrigan and Young; Justice Taylor simply did not participate.

Thereafter, the virtually identical substance of this Recusal Motion was raised and was denied a second time, of course, in Gilbert v DaimlerChrysler Corp., Supreme Court Docket No. 122457. There a virtually identical disqualification motion as to these same Justices on exactly the same grounds as advanced here was, again, ultimately denied all over again in Gilbert v DaimlerChrysler Corp., 469 Mich 883, 669 NW2d 265 (2003). That Motion has been resurrected here, in this case, for yet a third time. Gilbert, of course, finally resulted in complete reversal of a Twenty One Million Dollar ($21,000,000.00) verdict, overturned, in part, for the abjectly scandalous trial court behavior of Mr. Fieger more fully outlined in Gilbert v

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DaimlerChrysler Corp., 470 Mich 749, 685 NW2d 391 (2004).

In consideration of this Sisyphean[1], "sue until something gives" redundancy of Mr. Fieger, we now turn to our Response.

ADEQUATE STATE GROUNDS

Could it ever be a federal Due Process violation to allow Mr. Fieger to "cherry pick" only his admirers to sit as appellate judges by the device of removing those Judges he felt were philosophically unfriendly? Given the dozen or so claims that federal Due Process has been violated by the allegations of alleged personal bias purportedly appearing on the part of a Majority of the Michigan Supreme Court against Mr. Fieger, it, at once, becomes obvious that Mr. Fieger, with his peculiar brand of paranoidal self-absorption, has improperly equated Due Process with a wraparound form of Judicial Xenophobia, i.e., he who opposes me or rules against me or fails to agree with me denies me Due Process.

Due Process has never been, and should never be, an

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[1]Sisyphus, in ancient mythology, was, of course, the arrogant sinner whose defiant transgressions warranted being punished by the gods by being required, repeatedly, constantly, to roll a huge boulder up to the top of the same hill, over and over again. This perpetual expiation was as much stinging from the odious repetitive boredom as it was from eternal physical exhaustion. This was a stone so large the gods guaranteed that at the zenith, Sisyphus, using all of his strength, would always lose his footing at the precise moment before success, only to be condemned to this enervating ennui over and over again for all eternity. The irony Mr. Fieger fails to apprehend here is that it is we nonsinners whose First Amendment and Due Process rights are held of no moment, challenged as we are to the deepest reserves of our strength, to waste it utterly, by being obligated to attend to the same never ending, tedious disqualification task, pointlessly, over and over again.

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offensive sword to neutralize anyone and everyone who does not agree with one's political or legal views, to guarantee litigation victory by stacking the deck for decision but only by favorable Judges.

It is no wonder the Michigan Supreme Court finds these matters to be the consummate in Judge-Shopping improprieties. And it is no wonder why there would be much distaste in dealing with a ubiquitous, mud-slinging centrifuge of groundless charges by Mr. Fieger. The inclination of the Court to dispose of this spectacle by the device of a bland, unitary Order, articulated in the minimalist style of approach-avoidance, one which resolves the Recusal Motion by simply denying it, is understandable. But we feel that strong temptation to deny this Motion in the abstract with a general, undifferentiated order ought to be resisted here; all grounds for the denial ought to be detailed by the Michigan Supreme Court so that there is a full record for later review because Appellate Counsel for Grand Aerie predicts that is what is going to happen.

Review by us of the two previous Fieger/AGC and Gilbert Disqualification Orders reveals that an undifferentiated denial of those Recusal Motions were what was utilized here twice before; while this form of a general order may usually seem completely justified, such a blanket denial puts the Disqualification Respondent at a huge appellate disadvantage if, as appears to be the case here, there will later be a Petition for Certiorari to the Supreme Court of the United States.

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Because there are numerous "**adequate state grounds**" that should be preliminarily decided, mentioned and separately relied upon by the Michigan Supreme Court to justify denial of disqualification, we believe each of these grounds should be individually set forth.

Before any Due Process tears for Mr. Fieger are shed, the Grand Aerie, which might someday be in the position of Certiorari Respondent, asks the Court here to pass upon the cascade of other, nonconstitutional adequate state grounds available so as to have that august, higher body in Washington reject any such federal constitutional essay on the alternative, nonconstitutional grounds which decide the case first.

Persons experienced in handling Petitions For Certiorari to the Supreme Court of the United States know that the High Court tends not to accept Petitions if the decisions of the state court below rest (or could have rested) on other state law grounds that are independent of any federal constitutional question.

Thus, any "**adequate state grounds**" which are, fairly stated, appropriate as the ratio decendae to support the judgment made by the lower courts are used by the Supreme Court of the United States to decline review should be passed upon, as there is no reason to grant Certiorari if the constitutional crisis was avoided below on other less Draconian legal grounds. While dozens of cases can be cited for this well-known principle, the following statement in Coleman v Thompson, 501 US 722, 111 S.Ct.

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2546 (1991)(recognizing the rule) has this useful template for that precept, at 729-730:

> **"This court will not review a question of federal law decided by a state court if the decision of that court rests on a state law ground that is independent of the federal question and adequate to support the judgment**. . . .This rule applies whether the state law ground is **substantive or procedural**. . . .In the context of direct review of a state court judgment, **the independent and adequate state ground doctrine is jurisdictional. Because this court has no power to review a state law determination that is sufficient to support the judgment**, resolution of any independent federal ground for the decision would not affect the judgement and therefore would be advisory." (Emphasis supplied)

Also cited by Coleman for the same genre of this proposition are the cases of Fox Film Corp. v Muller, 296 US 207, 210, 56 S.Ct. 183 (1935); Klinger v Missouri, 13 Wall 257, 263, 20 LED 635 (1872); Herndon v Georgia, 295 US 441, 55 S.Ct. 794 (1935); Herb v Pitcairn, 324 US 117, 125-126, 65 S.Ct. 459 (1945).

Why is this important? Why should the Michigan Supreme Court "dignify" this character assassination by Mr. Fieger with a point-by-point rejection on procedural or substantive grounds? There are, in this case, numerous procedural points that need to be brought to the Michigan Supreme Court's attention which strongly militate against granting the present Recusal Motion; these points avoid the extreme unpleasantness of these federal Due Process gyrations based upon timeliness, staleness of the affidavit, the Necessity Doctrine and the rule holding that tactical, strategic Disqualification Motions are not permitted in Michigan.

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This Motion can be easily defended on a wide array of valid, reasonable grounds not necessary for decision at the level of constitutional analysis. These, we say, ought to be separately articulated by the Michigan Supreme Court, if, indeed, the structure of this case is, as we expect, finally going to the Supreme Court of the United States. The Supreme Court of the United States is keenly aware of the general usages of "block orders" on orders denying appellate relief. But there are so many devastating "adequate state grounds" here that such a routine, generic order puts the Certiorari Respondent, and the Justices defending their honorable reputations, at a genuine disadvantage. Specific delineation of each of the denial grounds gives the parties equal Certiorari footing in the battle joined in Washington where this case appears to be inexorably headed as ample "adequate state grounds" exist to avoid High Court review. Consider the following **"adequate state grounds"** as procedural points to begin with.

TIMELINESS

First of all, we urge denial of the Motion for the rank untimeliness of this very stale motion. Mr. Fieger's Recusal Motion relies upon MCR 2.003, repeatedly, conceding throughout his Motion and Brief that the cited rule applies to Appellate Judges as well as to trial judges. If this be so, then it must be noted that the cited rule, MCR 2.003(C)(1), states that Michigan Law also requires that these Motions be raised

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immediately (or certainly as soon as possible) as immediacy is one of the tests of validity:

> "To avoid delaying trial and inconveniencing the witnesses, a motion to disqualify **must be filed within 14 days after the moving party discovers the ground** for disqualification. If the discovery is made within 14 days of the trial date, the motion must be made forthwith. **If a motion is not timely filed, untimeliness, including delay in waiving jury trial, is a factor is deciding whether the motion should be granted.**" (MCR 2.003(C)(1). (Emphasis Supplied.)

STRATEGY SUGGESTED BY TIMING

The Harter appeal has been pending in the Michigan Supreme Court since June 1, 2004. Nine (9) months later, this twice-previously denied Recusal Motion, once again, mysteriously and belatedly surfaced; most suspiciously, it popped up like Banquo's Ghost, but only **after** the Michigan Supreme Court had issued its December 27, 2004 Order (See Exhibit "A") indicating the possibility of peremptory action on the part of the Supreme Court. This is purely strategic: Experienced Michigan appellate practitioners know that being placed on the Peremptory Action Docket could mean, possibly, a peremptory reversal, the granting or the denial of the Application, or maybe no relief at all, see MCR 7.302(G)(1). It may have become more clear to the *cognoscenti* that the merits of the subject appeal may have attracted the interest of a majority of the Court. Plaintiffs' knowledgeable appellate counsel has had the longstanding benefit of knowing all about the identical claimed recusal grounds which have been pending in this Court, in existence, in one fashion or

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another, since at least 2000, since he was responsible for raising it in Gilbert in 2003. Thus, the news of these calumnies is so old that it has expired in newspaper morgues: Nevertheless, about five (5) years later, mirabile dictu, Plaintiffs still have managed at this late date to repeat the process all over again, but only at the precious moment when Plaintiffs' victory became somewhat more remote.

Again, this Recusal was not filed when the Application was filed in June, 2004; no, indeed, Plaintiffs waited until things were, possibly, going sour on December 27, 2004; then, all of a sudden, there was a mad scramble to resurrect and to dust off this Gilbert redux Recusal Motion, word-for-word the same. Again, this latest Disqualification effort took place only when it looked like, as of December 27, 2004, that there was going to be the sheerest possibility of a ruling adverse to Mr. Fieger's clients. This precipitous form of belated, cynical posturing naturally, appears to be one of pure tactics and strategy, once things didn't seem so rosy to Plaintiffs, no more, no less. This gambit is not the maiden cry of the sudden discovery of unbeknownst alleged biases lately inculcated, but, rather, this is the carefully strategized Armageddon of very, very old, rejected news, which is, at bottom, as woefully untimely as it is redundant, being the five (5) year old rehash of what has already been denied by this Court twice before, long, long ago.

Overlook, for the moment, that our federal statutory counterparts, 28 USCA § 144 and 28 USCA § 455, also both require

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a timely and sufficient affidavit before the Judge who is sought to be recused. Additionally, federal courts also routinely reject Recusal Motions which are warmed-over leftovers, redundancies or, as here, merely constitute the ceaseless relitigation of previously rejected, supernumerary attempts at disqualification; moreover, our federal courts customarily cull out and deny as suspicious those recusals that are fatally stale when they are based on longstanding knowledge already clearly on the public record and known to the parties two (2) or three (3) years beforehand, as such untimeliness suggests the pure play of tactics and strategy, as here. See, for example, In Re: City of Detroit, 828 F2d 1160 (CA 6 Mich 1987).

When allegedly objectionable material is widely available as a matter of public knowledge for years beforehand and counsel seeking to recuse has been shown to have known about a purportedly unfavorable judicial disposition, indeed, or even a clear bias, for months (if not years) before the suddenly revivified present disqualification proceedings, the disqualification motion morphs into the unsavory. Such a delayed motion is often held as frivolous and the Appellate Courts ought to (and do) rebuff the tactical recusal motion as both strategic and, because of tactical choices, volitionally untimely. See, for example, National Auto Brokers Corp. v General Motors Corp., 572 F2d 953, 958-959 (CA 2)(1978).

Michigan has always frowned upon, as a matter of public and legal policy, permitting litigants to manipulate judicial

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proceedings with the ruse of an unsavory, strategic or tactical disqualifications. See Smith v Arc Mation, 402 Mich 115, 261 NW2d 713 (1978) (attorney disqualification); Kubiak v Hurr, 143 Mich App 465, 372 NW2d 341(1985)(same). When the disqualification record, as here, is one which can only be seen as the cynically strategic-- here, Plaintiffs' Counsel awaited the announcement of the possibility of peremptory action on December 27, 2004 as the clarion call to resurrect this disqualification - - before expressing feigned outrage at the Court's ability to make such a decision - - there is a waiver-style timeliness quotidian which suffuses the ancient claims of bias.

If this Motion were not a matter of pure strategy, where, pray tell, was the outrage of Mr. Fieger in the Harter case for the 249 days of June, July, August, September, October, November, and December, 2004 as well as January, 2005? Put another way, except for the December 27, 2004 Order, what was different on February 4, 2005 to justify this twice-denied recusal Motion? The extremely sensitive disqualification apparatus of MCR 2.003 should not be seen as a positioned weapon, kept in the basket like a coiled adder, only to be unleashed when the time becomes convenient or tactically necessary.

Under Michigan law, Mr. Fieger, as moving party, must overcome a very heavy presumption of judicial impartiality. Cain v Michigan Department of Corrections, 451 Mich 470, 497, 548 NW2d 210 (1996). It may surprise Mr. Fieger to know but it is clear in constitutional law that matters of alleged personal bias on the

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part of a judge appear to be, at most, matters of legislative discretion, something to be placed into a statute if the Legislature chooses. Matters of alleged personal bias on the part of the judge simply do not arise to areas of constitutional concerns under the Due Process clause, Cain, fn 33, citing Aetna Life Insurance Co. v Lavoie, 475 US 813, 820, 106 S.Ct. 1580 (1986). As such, claims of alleged personal bias against an umpire, as here, are those which appear to be of mere legislative discretion for statutory consideration, and do **not** involve deprivations of Due Process or areas of constitutional validity. Tumey v Ohio, 273 US 510, 522-523, 47 S Ct 437 (1927).

A STALE AFFIDAVIT

And what, exactly, is this assertion of alleged bias on the part of Justices Corrigan, Markman, Young and Chief Justice Taylor? It is based upon Mr. Fieger's extremely stale Affidavit of April 14, 200**3**, attached by rote to the Recusal Motion filed nearly two years later on February 4, 200**5**. Mr. Fieger's April 14, 2003 Affidavit was apparently resurrected from the Gilbert case, made as it was then exclusively based upon Mr. Fieger's "upon information and belief" view that the Michigan Chamber of Commerce and the United States Chamber of Commerce participated in the 2000 election which may have caused bias in that case. All of this is an embarrassing irrelevancy in any event for Harter because the Chamber of Commerce, whether local or national, has not entered this case and absolutely **nothing** to do

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with the instant case as the Chamber has not filed Amicus Curiae briefs here as was done in Gilbert. Not only is the two (2) year old Affidavit grossly irrelevant, pertaining wholly to another case, and to the circumstances of that case, the "facts" as testified to by Mr. Fieger in that affidavit, are, even worse, based upon information and belief, and even worse yet, two (2) years old.

Under the requirement of MCR 2.003(C)(2), a timely affidavit, presumably of events within fourteen days under MCR 2.003(C)(1), should accompany the recusal motion. Implicitly, the affidavit must be fresh, not something which is two (2) years old and, which has, at most, some oblique reference to the instant case, by resurrecting seven (7) year old political grudges from the 1998 Engler-Fieger campaign, no less.

In short, the use of Mr. Fieger's Gilbert "affidavit" by tardy osmosis in Harter has utterly nothing to do with the instant case except as a medium to resuscitate the repeatedly defamatory, scurrilous ad hominem attacks previously made on the individual justices sought to be jettisoned. How does Mr. Fieger explain the irrelevant Gilbert affidavit which, in Mr. Fieger's own words, asserts no direct proof of bias but is globally limited to the possibility that the challenged Justices, "[M]ay in fact kindle or rekindle bias, prejudice or antipathy towards me"; this against Justices Corrigan, Young and Markman, and also by Chief Justice Taylor (Fieger Affidavit of April 14, 2003, ¶ 25). Mr. Fieger hedges his bets as he bellows calumnies carefully

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parsed upon information and belief which "may" prove bias.

Can a blockbuster Recusal Motion which seeks to permanently remove a majority of the Court from decisionmaking ever be based upon a two (2) year old affidavit, levitated wholesale from another case, an "information and belief" dissimulation on the surmisable possibility of bias which is, itself, totally stale by two to seven years? We say that this, indeed, itself is an Adequate State Ground for denying this Motion, especially since, in point of fact, it relates to an entirely separate case, a major thrust of which was the Amicus Curiae participation of the Chamber of Commerce, the taint of which is in no way present here.

THE "RULE OF NECESSITY" AND DISQUALIFICATION AS "JUDGE SHOPPING"

Furthermore, it is axiomatic that the effort to disqualify a judge, while a matter which is only to be made with the greatest of gravity, is an maneuver which is entitled to substantially lessened respect if it is leveled at the integrity of all, or a majority, of the judges of a particular bench (or, even more cynically, against only those Judges constituting a decisional Majority whose judicial philosophy is guessed by the movant not to be favorable). Due Process considerations aside, the Courts must never allow the throttling of the impartiality of the decisionmaking process by selection of the Judges who will remain. United States v Will, 449 US 200, 101 S.Ct. 471 (1980)

Again, the decision by counsel to disqualify a judge should

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never be undertaken lightly, of course, but, such an attack is especially onerous (if not grossly transparent) when all or most of the judges on a particular bench are sought to be jettisoned. People v Craig, 728 NE2d 1289, 1290 (Ill App 2000); People v Saltzman, 796 NE2d 653 (Ill App 2003).

It is at once obvious that Mr. Fieger is trying, rather overtly, to structure his Court of Last Resort Appellate Panel by bouncing those Judges he deems unfavorable, a gimmick to fit his agenda of sustaining his stratospheric verdicts, but only on his terms, only within his comfort zone of total victory, so that his abominable behavior in the trial courts which has been repeatedly condemned by all manner of appellate panels considering them can be left behind with no concerns for reversal in the future. Should he succeed?

This olfactory strategy, again, implicates the "Rule of Necessity" reflected in disqualification litigation by United States v Will, 449 US 200, 101 S.Ct. 471 (1980) which suggests that, when all judges on a bench (or, as here, a majority thereof) are allegedly claimed to be "interested" in the litigation or are alleged to be predisposed unfairly towards one party or against another in an inappropriate way, a broadside wholesale disqualification of the entire bench, or a majority of it, cannot take place as it would jeopardize an otherwise impartial judicial function which, with top-to-bottom-disqualifications cannot then proceed without total chaos as no judges are left stand in judgment.

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Putting it another way, Mr. Fieger is trying by recusal to repeal Article 6 of the Michigan Constitution of 1963, to equate our Judicial system as if it were some form of a peremptory juror trial court challenge; Mr. Fieger contemptuously treats our State Courts, and our elected Judges and Justices, like so many inconvenient Foul Balls getting in the way of his home-run zone. He is brazen about waiting for a Panel of Judges he likes, and then, all of the sudden, when he thinks he is sure to win with the Judges he assumes will favor him, golly, then, and only then, will there be satisfaction expressed by Mr. Fieger with the Judges who remain to decide, individually passed on with approval by his idiosyncratic imprimatur.

As an adequate state ground, suggesting that Mr. Fieger is entitled to pick or reject his judges manipulatively on the basis of those who like him and his legal philosophy and those who do not (which is exactly how he picks his jurors in the trial courts, incidentally), invites (if not sanctions) strangulation of the state electoral process and mismanagement of state judicial administration. Such appalling gimmickry is a blanket attempt to Judge Shop, wreaking judicial havoc among state court judges in the process.[2]

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[2] This is not the first time that Mr. Fieger's inappropriate "judge shopping" misconduct has landed him into trouble. In In Re: Geoffrey N. Fieger, 191 F3d 451, 1999 WL 717991 (6th Cir 1991), Mr. Fieger filed 13 complaints for declaratory relief in conjunction with his infamous client Dr. Jack Kevorkian and continued to bat away unfavorable judicial assignments until he dismissed all of them except for Judge Gerald Rosen who, Mr. Fieger then accepted. A cynical individual would suggest that

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Putting it another way, the leading case in the United States was written by Justice Breyer when he was on the First Circuit in In Re: Allied Signal, 891 F2d 967, 970 (1st Cir 1989) which holds that the avoidance of the appearance of partiality is of great importance to the courts, but, when faced with obvious attempts by litigants to manage the bench by "cherry picking" the umpires, it is equally important according to Justice Breyer to ascertain and be aware of the enormous injustices that may arise out of unwarranted disqualification efforts if they are allowed to succeed.

LEGAL DISCUSSION OF DUE PROCESS

With this background in mind, we reach the substance of Mr. Fieger's disqualification as a matter of federal Due Process.

There is, of course, the issue of volenti non fit injuria in this process, the concept of highly voluntarily invited error in this drama. Mr. Fieger does not (and cannot) dispute that he has often willingly said the most outrageous things about each of the sitting justices he now wishes to disqualify. Mr. Fieger unabashedly courts the press with no-holds-barred-Judge-or-no-Judge-hyperbole. Is Due Process violated when there are rankly strategic disqualification motions brought to bear by the **attorney**[3] who has voluntarily cast himself at center stage by

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Mr. Fieger is doing, in effect, precisely the same thing here.

[3] Mr. Fieger does not contend that the Supreme Court Justices harbor any bias against the members of the Harter family or decedent themselves. In many jurisdictions, whatever opinion the judges hold against a particular attorney, it does not

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vituperative invective? When there are strategic, tactical reasons for the attorney's attempting to structure Disqualification Motions with a remarkable spate of previous vituperation, the Supreme Court has suggested that such disqualification tactics cannot succeed. Dubuc v Green Oak Township, 461 Mich 916, 609 NW2d 829 (2000) (concurring opinion of Justice Corrigan).

Put another way, by the same token, when there is a distinctly olfactory, publicly raucous debate instituted by the name-calling party who wants to dump the allegedly offended judges once name-called as "biased" once the slanderous cat is out of the bag, this staged gimmickry should not disqualify as a "set up" of a sitting judge, even when the polemic relates to the very matrix of the litigated controversy.

IS DUE PROCESS EVER IMPLICATED BY CYNICALLY STAGED VITUPERATION?

Was "Due Process" violated when Mr. Fieger, in 1996, after calling Justice Corrigan "a squirrel, mollusk and lizard" [see Gilbert v Ferry, 298 F.Supp2d 606, 609 (fn 1) (2003)] then sought, after calling her a rodent, moved to disqualify her? Mr. Fieger has also described certain Michigan appellate judges who have reversed his antics as "fascists"; see Gilbert v Ferry, 298 F.Supp2d 606, 609 (fn 1) (2003). After the Badlamenti decision, undersigned appellate counsel recalls that Mr. Fieger called Honorable Jane Markey, who reversed him for his trial

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transfer over to the clients, and until there is proof of this, there is not sufficient bias to disqualify. (See, infra)

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antics, "Eva Braun" on his former radio show.

In defending Dr. Kervorkian, he has publicly denigrated the Catholic Faith of Judge Fitzgerald and (now) Chief Justice Taylor. He publicly excoriated Chief Justice Taylor's integrity for being a close friend of his old nemesis, Governor John Engler, indeed, for allegedly improperly hearing cases when his wife was the Governor's legal attache. After the Badlamenti decision, undersigned appellate counsel recalls that Mr. Fieger questioned the masculinity of one of the Panelists on his [now, blessedly defunct] radio show. Should such an unrelenting barrage of personal abuse and invective geared towards recusal ever work as a "Due Process" beef if the Judges attacked without surcease decline to make getting themselves knocked off a self-fulfilling prophesy?

There is an inexorable need to prevent parties from too easily obtaining the disqualification of judges on grounds that they dislike them, or claims that do not favor one party or attorney or another, or prefer one attorney over another, as there is great harm in potentially manipulating the judicial system for strategic reasons, perhaps to obtain a judge more to the liking of the litigant who, like Mr. Fieger batting away his Judges until he gets the home run pitches he likes, selects judges by carefully strategic disqualifications to manipulate the Roster. Should Mr. Fieger be permitted to disqualify any and all judges that he wishes to remove by the simple expediency of calling them names in public?

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In Federal Deposit Insurance Corp. v Sweeney, 136 F3d 216 (1st Cir. 1998) a hotly contested case resulted in parties roundly criticizing the district judge in public and in the media. Ultimately the parties attempted to force disqualification of the judge, once he was so attacked. Should the tautological, cynically voluntary staging of the murder-suspect-having-killed-his-parents-throwing-himself-on-the-mercy-of-the-Court-as-orphan ever, ever work on grounds that these attacks must have caused the judge to be biased against that party who made the inflammatory statements in the first place? Not according to 13A Wright & Miller, Federal Practice & Procedure, § 3542 at 577-578, cited by Sweeney.

The First Circuit, in Sweeney, noted that a party cannot force disqualification of a judge by first attacking the judge and then, later, contending that these attacks must have caused the judge to be biased against the person making the inflammatory statements.

While, to be sure, Sweeney does not formally decide the case strictly on Due Process grounds, it is equally clear that a virtually identical factual situation found there suggested that the vituperation and, in turn, its use as invective, all spewn as a calculated risk for recusal purposes, were all part of a seamless strategic gimmick simply to bounce undesirable Judges. Thus, it can be argued that strategic choices to attempt to disqualify a judge, based upon inflammatory invective by the attorney or party themselves should not, do not and cannot

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constitute Due Process violations. These statements and actions are seen as no more than the grisly momentum to knock the undesirable judge off of the bench, a naked power grab by a private litigant brought about by unseemly public expression to achieve manipulation of judicial assignments.

Such strategic manipulation of the Recusal Process, as here, scarcely implicates Due Process. In In Re: United States of America, 666 F2d 690 (1st Cir. 1981), the First Circuit strongly rejected any view that strategic timing of a belated Recusal Motion could result in an improper decision relating to disqualification with this irrefutable logic:

> "These circumstances illustrate the problem that arises when a litigant files a Motion For Recusal after the trial is concluded. He may have proceeded with the first trial to test the court's reaction only later to marshal previously known information in an attempt to get the proverbial second bite at the apple. Even if a litigant were not consciously attempting to manipulate the circumstances to his benefit, the potential waste of judicial resources alone requires that a motion for disqualification be timely filed. See, generally, In Re: International Business Machines, Corp., 618 F2d 923, 932-934 (2nd Cir. 1980)."

Furthermore, in the cited case, In Re: United States of America, even if there were close advisory involvement by a Judge, for example, with the governor, or indeed, even if the sitting Judge has offered the governor substantial political support, this facts-of-everyday-political-life-backdrop are not remotely sufficient to disqualify the sitting judge. 666 F2d at 694-698. Since this is so, what Mr. Fieger says cannot be elevated as a Due Process problem as it is equally clear in the

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first place that the "personal bias" of a judicial officer cannot even be regarded as a Due Process problem[4].

In a sentiment which almost appears prescient for this case, the United States Court of Appeals for the Second Circuit held in In Re: Drexel Burnham Lambert, Inc., 861 F2d 1307 (CA 2 1988) that the court should be most cautious in elevating disqualifying sentiments which appear in the press as these empower the declarants with the ability to recuse undesirable judges; this gimmickry can result in naked Judge Shopping:

> "In deciding the sensitive question of whether to recuse a judge, the test of impartiality is what a reasonable person, knowing and understanding all of the facts and circumstances would believe. It is for that reason that we cannot adopt a per se rule holding that when someone claims to see smoke, we must find that there is fire. That which is seen is sometimes merely a smokescreen. **Judicial inquiry may not therefore be defined by what appears in the press. If such were the case, those litigants fortunate enough to have easy access to the media[5] would make charges against a judge's impartiality that would effectively veto the assignment of judges. Judge-shopping would then become an additional and potent tactical weapon in the skilled practitioner's arsenal.** (Emphasis supplied).

Much of what plaintiff contends to be at the epicenter of this alleged controversy, taken in the light most favorable to Mr. Fieger, is that Geoffrey Fieger was once the political gubernatorial opponent in 1998 of former Governor John Engler

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[4] Cain, fn 33; Aetna Life Ins. Co. v Lavoie, 475 US at 820; Tumey v Ohio, 273 US at 522-523.

[5] Is there any public figure with easier access to the media than Geoffrey Fieger? Radio and television shows, thousands of press statements, this lawyer has press references in the range of 10,000 statements to the press according to a "Google" search.

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and, in turn, Mr. Fieger then and later expressed extreme political criticism of these supposedly supporting Judges which, in turn, drew defensive comments from some of these Justices, all of which purportedly tends to show a deep, personal bias against Geoffrey Fieger.[6]

The sine qua non presumption by Mr. Fieger here is that political opposition between such parties automatically disqualifies the judges on Due Process examination. When counsel is a political opponent, even when that high degree of personal involvement is present, it does not automatically disqualify a judge from a finding of impartiality. See, for example, Burnham v Stevens, 734 So2d 256, 262-263 (Miss App 1999); Reach v Reach, 378 So2d 1115 (Ala App 1979).

In United States v Roebuck, 289 F.Supp2d 678 (DC VI 2003) the District Judge there noted that the use of a scurrilous newspaper article or statements in the press against him could be effectively seen as the calculated groundwork for his ultimate recusal motion. The Court stated:

> "If such a fantastic procedure were permitted, a defendant could rid of a judge by the simple expedient of publishing a scurrilous article, truthfully alleging that the article was published, and clinching the matter by asserting the bald conclusion that, since the article was uncomplimentary, the judge must of

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[6] Mr. Fieger and his appellate counsel decline to differentiate between statements made by public interest committees not authorized by the Judges and Justices and those which are purportedly made by the Judges and Justices themselves. So parsed, the allegedly improper statements by the Justices are far fewer and more generalized as to protected speech under Minnesota Republican Party.

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> necessity be prejudiced against the publisher. The attorney had contended that the opposition to the district judge's appointment was driven not by politics but instead by alleged instances of judicial misconduct."

The District Judge in Roebuck contended that the lawyer's personal attack on him was nothing more than a designated litigation tactic that could be labeled Judge-Shopping in most places and, that, when, as here, there is scurrilous personal attack on a sitting judge designed to eliminate that Judge from sitting on any of the declarant's cases, the attempt to manipulate the docket to the party's benefit in this fashion creates a public policy problem which ought to be avoided. When, as in Roebuck, a political opponent voices an opinion against the Judge's judicial appointment this is, only relevant at the point that the election/appointment process has been favorably or unfavorably resolved. Absent more, the previous political opposition of a lawyer who later appears in front of a Judge cannot be a legitimate basis for disqualification for years to come.

When a lawyer engages in direct political opposition as to a specific judge, even this direct, politically adversarial role is simply insufficient to cause the judge to recuse himself or herself. See, for example, United States v Olander, 584 F2d 876, 887 (CA 9 1978), vacated on other grounds, 443 US 914. It has been noted that prior written attacks upon a Judge are legally insufficient to support a charge of bias or prejudice on the part of the judge towards the author. United States v Bray, 546 F2d

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851, 858 (10th Cir. 1976).

Because of First Amendment considerations, lawyers are always completely free to criticize the decisions of judges. As licensed professionals, however, they are not free to make recklessly false claims about judges' integrity, absent specific proof of improper misconduct on the part of the Judges. In Re: Wilkins, 782 NE2d 985 (Ind 2003).

In a somewhat analogous situation applicable to some of the Justices, the Supreme Court of Mississippi in Doe v Stegall, __ So2d ___, 2004 WL 868765, recently declined a litigant's attempt to recuse a judge of the Mississippi Court of Appeals. Stegall is most analogous to what is claimed to exist against Justices Markman and Young, we think. Judge Griffis, during his campaign for the Appellate Court, suggested that he was opposed to various special interest groups like "the personal injury lawyers who have created the lawsuit industry". This is the same genre of alleged statements purportedly attributed to Justices Markman and Young. Judge Griffis challenged his campaign opponent in a denigratory way as a former President of the Mississippi Trial Lawyer's Association ("MTLA"), a position likewise previously held by the litigant's attorney.

Noting, as we will do so below, that Judge Griffis' voting record concurrently established that he did, in fact, occasionally rule for plaintiffs during his appellate tenure, and finding that other members of the MTLA had sometimes received favorable appellate dispositions during Judge Griffis' appellate

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decisionmaking tenure, the Mississippi Supreme Court concluded that there was no demonstrable bias which would remotely justify removing that Appellate Judge on recusal motion.

As Judge Battani pointed out in the Gilbert v Ferry decision, supra, fn 1, Mr. Fieger believes that he is free to call Supreme Court Justices and Court of Appeals' Judges "fascists", and small rodents, and suggest, as Mr. Fieger indisputably has done, that Justice Taylor improperly received his appointment while living with his wife who was a government official connected with Governor Engler.

There have been a plethora of other insults by Mr. Fieger, a whole fusillade of other wild accusations from being Nazis to being masculinity-challenged, to being (God Forbid) Pro-Life Catholics, as if the First Amendment does not protect the Judges and Justices, just as it does Mr. Fieger's rather outlandish comments. Perhaps counsel for Mr. Fieger is unaware that the First Amendment applies, equally, however, to the Judges who are running for election. Republican Party of Minnesota v White, 536 US 765 (2002). There the Supreme Court of the United States observed that a judge's lack of predisposition regarding relevant legal issues in a case has never been thought a necessary component of equal justice as it is virtually impossible to find a judge who does not have preconceptions about the law to be decided. Nor, according to Republican Party of Minnesota, are Justices of the Minnesota Supreme Court obliged to refrain from advancing opinions on the campaign trail which are controversial

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or even which indicate how the Judges may rule in the future.

Mr. Fieger has engaged in a constant onslaught of personal vituperation against each of these Justices at a fundamental, personal level at various times. In February, 1996, the Detroit News quoted Mr. Fieger as suggesting that it was not fairly handled by the Court of Appeals in the infamous Jack Kevorkian case because "I had three right-wing Catholic judges [including Chief Justice Taylor] deciding against me." On February 12, 1996 Mr. Fieger was quoted on the WWJ A.M. Radio Station as stating that there was a conspiracy between the Oakland County Prosecutor's Office and the Michigan Court of Appeals (with the integrity of Judge Maura D. Corrigan, a former prosecutor, assailed at the center). On February 25, 1996, Mr. Fieger said about the Court of Appeals' Judges, including Justice Corrigan, "they're squirrels, mollusks and lizards. . . and if they don't like what I'm saying about them let them come down here and tell me."

Michigan has somewhat faced this problem before in a much more muted case, Schellenberg v Rochester, Michigan Lodge No. 2225 of the Benevolent and Protective Order of Elks and the United States of America, 228 Mich App 20, 577 NW2d 163 (1997). There, a newspaper account depicted Honorable Hilda Gage, then sitting as Circuit Judge, as an ardent feminist. This expression of pro-women issues was sought to disqualify her in a case involving the refusal on the part of a Fraternal Lodge to grant membership to a woman under the Public Accommodation portions of

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the Elliott-Larsen Act. Given Judge Gage's comments on the record about her political support of women's issues, the defendant insisted that the trial court should have disqualified herself.

Citing Cain v Department of Corrections, 451 Mich 470, 495, 548 NW2d 210 (1996) the Schellenberg appellate court held that the newspaper articles did not furnish the basis for a showing of actual personal bias or prejudice in favor of feminist ideals on Judge Gage's behalf, even if her political statements favorably expressed sympathy with the side of the plaintiffs. Such newspaper articles do not overcome the Cain heavy presumption of judicial impartiality, created for these cases, Schellenberg ruled. While certainly not identical, that case should be followed here as a guide.

Judges do not have to be silent automatons who never invoke their own First Amendment rights in their own defense. In Metropolitan Opera Association, Inc., v Local 100, Hotel Employees & Restaurant Employees International Union, 332 F.Supp2d 67 (DC NY 2004) a judge was held not to show animus by discussing existing litigation during the course of a legal education seminar and his recusal was not necessary based upon comments made during the seminar after the liability decision had been reached.

Consider, next, Yaeger v State of Indiana, 437 NE2d 454 (Ind 1982) in which the trial judge made hostile statements concerning counsel during the course of the litigation made after the

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appellant's trial but prior to his sentencing. Because of some personal threats made by appellant against the judge, these threats evoked public comments by the judge that he was "mad" and "concerned" about appellant's threats, but the Indiana Supreme Court agreed that the angry statements did not destroy the core of the integrity of the Judge under attack:

> "However, we do not see these remarks as showing such prejudice against appellant as to deprive him of the right to be tried before an impartial judge. At best, the remarks attributed to the judge reflect the frustrations he must have felt in dealing with an extremely uncooperative defendant who had made thinly veiled threats against the judge and other Vanderberg county officials. The Court of Appeals has observed that the showing of a strained relationship between a parties attorney and the judge is not reason for the judge to be disqualified. Leistikow v Hoosier State Bank of Indiana, 394 NE2d 225 (Ind App 1979)."

In United States v Bayless, 201 F3d 116 (CA 2, 2000) when the person who had previously made public criticism about the judge chose not to move for recusal until after there was the possibility of adverse decisional action [identically with the case here]. The Second Circuit noted that the timing of this gamesmanship was fatal:

> "In this case, Judge Baer faced a difficult choice. Confronted with unrestrained criticism from both politicians and the press, including calls for his resignation and even his impeachment, he was forced to decide whether to disqualify himself when doing so readily could have been perceived as a capitulation to political pressure - a capitulation, moreover, that might well have encouraged other pressure on judges in the future. And he was aided in making his choice neither by clear legal principles nor by a timely motion from defendant.
>
> The circumstances under which criticism of a judge from political figures or from media might be grounds

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> for recusal under §455(a) are anything but clear. Nevertheless, many cases that have considered whether media criticism constituted grounds for recusal have found that it was not.
>
> * * *
>
> This circuit has expressed caution in allowing media accounts to become the focus of a recusal inquiry. . . .in doing so, our court emphasized that one of the serious problems with ruling that media attacks on a judge can be readily made the basis for recusal: **parties who are sophisticated in their dealings with the press might then be able to engineer a judge's recusal for their own strategic reasons."** (Emphasis supplied)

Even if Geoffrey Fieger and these Justices were direct political opponents in a hotly contested election-- which they never were despite false attempts to so paint these persons as direct political opponents-- even that high degree of adversity would not be necessarily sufficient to disqualify these Justices. In Re: Disqualification of Burnside, 657 NE2d 1346 (Ohio 1992).

The heated political milieu of Nevada gives us three examples of how to deal with similar recusal accusations involving a Justice's political life. When a Justice of the State Supreme Court makes heated comments during an election about the propriety of a specific attorney's donations to one of the Justice's then-active opponents, the statements still do not necessarily warrant disqualification. City of Las Vegas Downtown Redevelopment Agency v Hecht, 940 P2d 127 (Nev 1997). One of the reasons that this is so is because the Nevada Supreme Court recognized that there is an enormous difference between the attitude the Judges may have against an attorney for the party

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and the party himself or herself. Furthermore bench-wide disqualification measures fill Appellate Courts with amorphous dread, because, as the Hecht Justices in unison put it, "**...if a litigant could successfully challenge a judge based upon allegations of bias against counsel for the litigant, it would decimate the bench and lawyers, once in a controversy with a judge, would have a license under which the judge would serve at their will.**"

In refusing to allow political comments made by a Justice with reference to an individual lawyer to reach the disqualification level, the Nevada Supreme Court stated:

> "Before a justice or judge can be disqualified because of an animus towards a party's attorney, egregious facts must be shown. When reviewing the statement or conduct of a judge or justice made in a campaign setting, reasonable latitude must be given in recognition of the realities of the election process. **This is particularly true if the attorney has inserted himself or herself into the contest.** (Emphasis supplied)
>
> Justice Young's remarks about Waters' donations certainly do not show any disqualifying animus towards Waters."

In warning against manipulating the assignment of Justices of the Supreme Court based on political contributions, the Supreme Court of Nevada also said in In Re: Dunleavy, 769 P2d 1271 (Nev 1989), in rejecting the disqualification of a Supreme Court Justice:

> "Second, intolerable results would also obtain if a litigant could disqualify a member of this court solely because counsel for the litigant's adversary had years before contributed to the Justice's campaign.

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> The citizens of this state have voted to retain an elected judiciary and the Nevada Constitution specifically provides that the Justices of this court shall be elected. . . . although the fact that Sheriff Davis' counsel contributed to Justice Young's campaign years ago is a matter of public record, Dunleavy tendered no challenge until Justice Young had entered his ruling upon Davis' motion."

Even when a direct former opponent and adversary in a judicial campaign appears before the opposed Judge, this political heat does not automatically disqualify the sitting judge. In Re: Disqualification of Celebrezze, 657 NE2d 1341 (Ohio 1991).

For additional guidance, the similar incendiary factual backdrop found in Ainsworth v Combined Ins. Co. of America, 774 P2d 1003 (Nev 1989) should also be consulted. There, Chief Justice Gunderson reinstated a Six Million Dollar ($6,000,000.00) Punitive Damages Award in an extremely contentious bad faith case. The insurance company, Consolidated Insurance, filed a remarkable, broadside recusal attempting to attack every aspect of Chief Justice Gunderson's actions in the case, all as biased and partisan. Among the allegations registered by the Consolidated Insurance Company was that Chief Justice Gunderson had allegedly recently improperly participated in the case after he had failed to disclose that the Nevada Trial Lawyer's Association had currently honored him for his support of legal causes which the Plaintiff's Bar espoused. NTLA bestowed these honors just before the opinion favoring the plaintiff was announced by Chief Justice Gunderson. Not unlike the Chamber's

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activities in the Gilbert case, NTLA had filed an Amicus Brief in favor of the plaintiff's position; the NTLA was then also actually honoring the deciding, opinion-writing Justice. It was also alleged that the Chief Justice, in his acceptance remarks before the NTLA Convention had said that the Nevada Trial Lawyers were always welcome in his court because "they [the Trial Lawyers] were always on the right side."

In many ways, Ainsworth constitutes a mirror image factual scenario of seemingly biased political commentary, even more egregious than that here, albeit on the "liberal" side of the fence. In rejecting the claimed philosophical alliance between the Chief Justice and NTLA as improper, the Nevada Supreme Court found no substance in the allegations of bias as to Chief Justice Gunderson's acceptance speech of his honorific and, in NTLA's honoring the Chief Justice for his eighteen (18) years on the bench as a "Plaintiff's Judge". Ainsworth held that such a favorable relationship, even with current Amicus Curiae in direct support, could not have tainted the Chief Justice's decision as biased and partial. Mr. Bendure cites no case - - and we can find none - - to suggest that analogous, opposing political activities or statements on the campaign trail may be tantamount to a deprivation of federal Due Process.

LEGAL HISTORY AS PROVING IMPARTIALITY

The foregoing summary puts all of the claimed allegations against each of the targeted Justices into focus. Under the

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Michigan Constitution, we have an electoral system for our Supreme Court Justices. Parties on both sides donate and contribute funds to each of the Justices, support the candidate of their choice or oppose him or her, in keeping with the Freedom of Expression as Protected Speech for campaigning Judges articulated by the United States Supreme Court in Republican Party of Minnesota v White, 536 US 765 (2002).

It is now time for a reductio ad absurdam. Let us dive headlong into the muck of political labeling parlance as we have been shamelessly invited to do by the take-no-prisoners cataloguing of our Justices as "conservative" or as "liberal". If Mr. Fieger and his Appellate Counsel are right, indeed, that these "conservative" Justices "hated" Mr. Fieger and have a personal animus against him, then it should be very difficult to find a steady string of cases, any cases, in which Mr. Fieger's firm and Mr. Fieger himself have ever won before these allegedly biased Justices. By the same token, the "good" [read "liberal"] appellate Judges and Justices must always be shown to agree with Mr. Fieger, if his thesis is right.

On the contrary, the reality is that a number of cases authored by these very attacked Justices, sitting as Supreme Court Justices and Court of Appeals Judges, have frequently ruled in favor of Mr. Fieger and his clients, indicating a strong lack of evidence of actual personal malice on the part of the Judges as alleged by Mr. Fieger. On the contrary, a number of decisions have routinely been decided by members of the Michigan Supreme

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Court, including Justices Young, Corrigan and Markman as well as Chief Justice Taylor, which have fully supported Mr. Fieger's legal positions indeed, even when he or his firm were directly a legal malpractice defendant. Lawsuit Financial, LLC v Fieger, Fieger, Kenny & Johnson, P.C., 471 Mich 885, 688 NW2d 502 (2004).

Do the alleged "biases" mean Mr. Fieger always loses in front of these conservative Justices? Well, no, in point of Michigan legal history, Mr. Fieger has fared surprisingly well at times when the allegedly biased "conservative" Justices or Judges review his cases. See, Baudrie v Henderson, 465 Mich 124, 631 NW2d 308 (2001) (Supreme Court reversed Court of Appeals to implement the Public Duty Doctrine in favor of Mr. Fieger and his client reversing the previous defense Court of Appeals' decision) (Opinion by Justice Young, also concurred in by Justices Corrigan and Markman); Grievance Administrator, Attorney Grievance Commission v Fieger, __ Mich __, 670 NW2d 563 (2003) (Justices Young, Taylor and Markman supporting Mr. Fieger's viewpoint); Schmidt Bagel Creations, Inc. v Fieger, Fieger & Schwartz, P.C., 1999 WL 33435716 (Court of Appeals Judge Honorable Stephen Markman upholding dismissal of legal malpractice charges); Amtower v William C. Roney & Co., 232 Mich App 226, 590 NW2d 580 (1999) (Honorable Robert Young sitting as Court of Appeals Judge, holding the trial court dismissal as a totality based upon the statute of limitations had to be reversed).

So much for the Justices who monolithically close ranks, always to do "evil" to Mr. Fieger.

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The core thesis of Mr. Fieger's claim, we say, is patently ridiculous on its face. Do the "good", "liberal" Justices rally around the Juggernaut Fieger with utter unanimity? Hardly. So-called "liberal" justices and judges have routinely ruled resoundingly against Mr. Fieger in a variety of contexts, smacking him down very hard, which makes it clear that political philosophy and putative political orientation for all these fine, conservative, liberal, moderate and apolitical Judges get left at the Courthouse Door and have nothing whatever to do with decisions which excoriate Mr. Fieger on a personal or professional level, or for that matter, support him.

If "conservative" justices have sometimes, if not routinely, recently ruled for Mr. Fieger, as we have seen, including the very Justices here under attack, then, by the same token and by the same logic, those who are "liberal" or "moderate" must never have reamed Mr. Fieger for his infamous trial tactics. According to Mr. Fieger, the "good" Judges/Justices will always give him justice because they do not have a political interest in his being defeated. Well, here too, the reality is that these "liberal" judges have often resoundingly denounced such inflammatory, Fiegeresque tactics as in Jackson County Hog Producers v Consumers Power Co., 234 Mich App 72, 592 NW2d 112 (1999). There, William B. Murphy, that superb "liberal" Appellate Judge, joined the rest of the Panel in condemning Mr. Fieger's discovery violations in falsifying documents and outright fraudulent interrogatory answers. By the same token,

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that irretrievably "liberal" Court of Appeals Judge E. Thomas Fitzgerald wrote the majority opinion in Hobbins v Attorney General, 205 Mich App 194, 518 NW2d 487 (1994) in connection with denouncing Mr. Fieger's views that there was no constitutional right to commit suicide. (For this, Judge Fitzgerald's Catholicism was mocked by Mr. Fieger in the press as "pro-life".)

Perhaps the most remarkable coalescence of "liberal" Court of Appeals Judges giving Mr. Fieger his deserved comeuppance for his remarkably inflammatory trial tactics is that found in Powell v St. John Hospital, 241 Mich App 64, 614 NW2d 666 (2000) in which a distinguished panel of so-called "liberal" judges (Judges Gribbs, Mark Cavanagh and Hilda Gage) condemned Fieger's patented, olfactory tactics. Suspiciously, Powell was missing from Appellate Counsel's list of Judicial Horribles. The "liberal" Judges in Powell reversed a $13 Million award for Mr. Fieger's claiming that the defense had "tortured" the decedent, heaping untold abuse upon defense counsel as having actually participated in the killing of the plaintiff's decedent, as well as accusing all defense lawyers and experts of being in abject dishonesty on the part of the defense and its witnesses. That is also the exemplar of Mr. Fieger's whipping up racial and homophobic fear simply to win the case.

Are they "biased"? The Powell Trial Judge was Marianne Battani, now also the federal district judge who ruled against him in Gilbert v. Ferry, supra; she is no "conservative" by any means. She granted a $6 Million Remittitur in Powell, which was

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accepted by Mr. Fieger without any Cross Appeal. Is she biased?

In Curry v. Westerby, Judge Geoffrey Neithercut of the Genessee Circuit Court struck out $41 Million of damages, interest included, as unlawful in an order which Mr. Fieger did not appeal. Was this "liberal" Judge biased?

How is this odd melange of surprisingly good luck with putatively denominated "conservative" Judges/Justices and predictably bad results with so-called "liberal" Judges/Justices rationally explained? An obvious answer is that Michigan Judges and Justices, irrespective of personal, political or legal philosophy, take their duty to follow precedent and to be ruthlessly impartial very, very seriously. Politics get left at the door by them. Would that this would be so for Mr. Fieger.

While Mr. Fieger's omnivorous appetite for the outlandish at trial would test the patience limits of any appellate umpire of taste, decorum and dignity, at bottom, his present Recusal Motion is utterly without merit in the grounds presented. As the analysis above demonstrates, the Courts of Michigan have meted out impartiality to Mr. Fieger with admirable equanimity.

Mr Fieger wants to be free of Judges and Justices who reverse him for antics which have proven unacceptable to the duly elected Appellate Bench of this state, spread across the broad political spectrum of Appellate Judges elected by the voters of this State, most of whom hold that Mr. Fieger's Peck's Bad Boy Routine in every trial is reversible error. Mr. Fieger's invitation to be above the law is a complete inversion of what

Due Process really means. Let this be the end to this nonsense.

WHEREFORE, Defendant-Appellant Grand Aerie Fraternal Order of Eagles prays that Plaintiffs' Motion For Recusal And For An Evidentiary Hearing Be DENIED for a lack of merits in the grounds presented, that each ground for DENIAL thereof be specified with particularity by the Michigan Supreme Court and that this matter be set down as established by the December 27, 2004 Order for argument as to granting application for leave to appeal and/or peremptory action by this Court under MCR 7.302(G)(1), the argument to be conducted before all seven (7) Justices who have been duly elected to and serving in the Michigan Supreme Court, together with all actual costs the Court deems appropriate to award in favor of Defendant-Appellant.

Respectfully submitted,

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